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By TAO LEUNG*

Introduction

Imagine John C. Holder, a fruitstand owner, catches a young boy stealing an apple from his stand. Because John does not wish to be deprived of an asset that rightfully belongs to him, he immediately calls the authorities to throw the boy in prison (without realizing that the boy did not know he was stealing and was bringing the apple back to his sickly sister). Upon realizing that there are apple trees available for free public consumption adjacent to his stand, he spends thousands of dollars hiring bulldozers to plow down the trees. John then institutes strict security measures that subject customers and potential thieves alike to invasive searches. Although these measures thwart some thieves, they do not completely eradicate the problem and winds up turning away some of his most faithful customers. He then creates signs that state: "Stealing apples is a crime and those caught will be prosecuted to the full extent of the law." Unbeknownst to John, the signs are in a different language than the one commonly used in the area and even those who can understand the language find the rule contrary to that area's social and cultural norms. Despite these measures, the stealing continues until John C. Holder is bankrupt.

This scenario mirrors both what the entertainment industry has done in its attempt to solve the online illegal file sharing problem as well as what the United States has attempted in its quest to institute

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better intellectual property protections in China. The purpose of this note is to illustrate how both the United States and the RIAA adopted narrow-minded approaches in a desperate attempt to curtail burgeoning intellectual property infringement, and how these approaches not only proved ineffective, but possibly exacerbated the problem.

Part one will focus on how, for entirely selfish reasons, the music industry in particular has treated the advent of peer-to-peer ("P2P") technologies such as Kazaa, BitTorrent, and FreeNet as a death knell for copyright protections. It will then discuss how this parochial vision has prevented the recording industry from providing limitless opportunity, instead of causing massive and misguided bad publicity and reduced sales. The industry has also ignored economic, social, and cultural realities, and naively believes its misguided rules will deter further illegal file sharing.

Part two will discuss how the United States has approached intellectual property protection in China just as narrow-mindedly as it handles the music industry. The United States' approach illustrates its obsession with fiscally driven motives, belief that its system is superior, and apathy for sustained development or collateral costs. The United States has responded to the continued piracy in China by blaming various scapegoats and adopting measures that are coercive, grossly inefficient, and unproductive. The United States' strict standards also disregard cultural, social, political, and economic realities, making these laws virtually ineffective.

Part three will propose possible solutions to both situations, providing alternatives to the current disastrous outcomes.

I. The Record Industry's Battle Against P2P Infringers

A. Misguided Approach

The emergence of P2P technologies such as Kazaa, Napster, and BitTorrent has made it possible for users to easily share electronic files on peer-to-peer networks.[1] This technology enables users to download music and other works free of charge, depriving copyright holders of revenue they potentially could have received through

1. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S. Ct. 2764, 2770 (2005).

tangible purchases.[2] Large-scale copyright holders such as the Recording Industry Association of America ("RIAA") argue that P2P networks facilitate "internet piracy" and must immediately be stopped.[3] Essentially, the entertainment industry equates online downloading of copyrighted content with theft.[4]

However, this analogy provides an oversimplified view of the complex nature of copyright law.[5] The RIAA's simple theft analogy ignores several issues that bear on the legal ramifications of P2P technology.

Foremost among those issues is the purpose of the Copyright Act.[6] The Copyright Act grants a copyright holder "exclusive rights to use and authorize the use of his work in five qualified ways."[7] However, the purpose of the Act is not to confer unlimited rights and a monopoly over the work to its creator. Rather, the Act is meant to provide a reward for creative works in order to "stimulate artistic creativity for the general public good" and thus "promot[e] broad public availability of literature, music, and the other arts."[8]

Many advocates of P2P file sharing contend that P2P technology satisfies both these purposes.[9] P2P provides an easy method to promote the "broad availability" of works because files can be instantaneously shared throughout the globe.[10]

P2P also helps stimulate artistic creativity by providing incentives to create. The RIAA has chosen to focus solely on the piracy of copyrighted works, which protects the rights of its own artists.[11] While the RIAA's concern for its own artists is understandable, it is far too shortsighted. P2P file sharing allows emerging artists – many

2. Raymond Shih Ray Ku, *The Creative Destruction of Copyright: Napster and the New Economics of Digital Technology*, 69 U. CHI. L. REV. 263, 264.

3. Michael Suppappola, *The End of the World as We Know It? The State of Decentralized Peer-to-Peer Technologies in the Wake of* Metro-Goldwin-Mayer Studios v. Grokster, CONN. PUB. INT. L. J., 2004, at 122, 123.

4. Respect Copyrights.Org, at <www.respectcopyrights.org/content.html> (follow "What is Piracy" hyperlink) (visited February 18, 2006).

5. Peter K. Yu, *P2P and the Future of Private Copying*, 76 U. COLO. L. REV. 653, 668 (2005).

6. Suppappola, *supra* note 3, at 128.

7. Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417, 433 (1984).

8. *Id.* at 431-32.

9. Suppappola, *supra* note 3, at 123.

10. *Id.*

11. Peter K. Yu, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 384 (2003).

of whom the established music industry tends to ignore due to production limitations – to promote their work to a broad audience.[12] Most artists do not have the resources to promote themselves through radio, television, or touring because only a tiny fraction of artists (approximately 2 percent) sign recording contracts with big labels.[13] In this way, P2P encourages creative works that might otherwise not have an opportunity to thrive.[14]

By adopting a narrow perspective that file sharing is merely a conduit for copyright infringement and the cause of sagging CD sales, the RIAA missed an opportunity to capitalize on a new distribution model with unlimited potential for profit.[15] The RIAA could have received profits for the same copyrighted material at a fraction of the cost of distribution by eliminating the need for warehouses and reducing, manufacturing costs.[16] Instead, it obstinately clung to outdated profit levels, distribution models, and attitudes toward consumers. One approach the record industry might have adopted was to treat MP3s – the popular format in which music files are traded – as the new CDs. For example, when CDs were first introduced and began to gain popularity, cassettes sales simultaneously dropped.[17] Borrowing from past experience, the RIAA should have developed strategies to market the new technological innovation rather than hoping it would just disappear.[18] As Peter Yu insightfully observes about this situation, "the key to success is not how a firm or in this case an industry, protects its existing business model, but how it adapts that model to new conditions and technological environments."[19]

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12. *Id.*

13. Laurence Pulgram, *Napster's Side of the Story*, at <writ.corporate.findlaw.com/commentary/20000501_napster.html> (visited March 2, 2006).

14. *Id.*

15. Yu, *supra* note 5, at 749.

16. Stuart Biggs, *Public Tires of Same Old Song from an Industry Slow to Change*, SOUTH CHINA MORNING POST, Sept. 13, 2005, at 2.

17. Ger Tillekens, *Trends and Shifts in U.S. Music Sales*, JOURNAL ON MEDIA CULTURE, (April 1999), available at <www.icce.rug.nl/~soundscapes/VOLUME02/Trends_and_shifts_in_music_sales.html> (visited February 17, 2006).

18. Ian Condry, *Cultures of Music Piracy: An Ethnographic Comparison of the US and Japan*, 7 INT'L J. CULTURAL STUD. (Sept. 2004), available at <ics.sagepub.com/content/vol7/issue3> (visited October 12, 2006).

19. Yu, *supra* note 5, at 749.

B. Misguided Solutions

Because the RIAA viewed P2P technology as a threat instead of an opportunity, it decided to eliminate that threat. Fortunately, the RIAA did not adopt the most extreme solutions, such as Senator Orrin Hatch's (R-Utah) suggestion that he "favor[ed] developing new technology to remotely destroy the computers of people who illegally download music from the Internet" because that "may be the only way you can teach somebody about copyrights."[20] Nevertheless, the RIAA engaged in other coercive means to curtail P2P file sharing, most notably suing individual file-sharers.[21]

Although the RIAA settled with most of the defendants for amounts that ranged from $12,000 to $17,500, it reasoned that the damage amounts were high enough to catch the attention of file swappers and intimidate them into continuing their illegal practices.[22] However, the proposed "solution" of suing individual file-sharers was fraught with difficulties that rendered it impractical, grossly inefficient, and ineffective.[23] Successful enforcement is infeasible because the Internet is transnational and decentralized and file-sharers have access to military grade cryptography.[24]

To further complicate matters, the only way the RIAA has been able to find individual infringers is if the Internet service provider ("ISP") turns over the infringer's IP address.[25] Initially, a district court in *In re Verizon Internet Services, Inc.*, ("Verizon I") enforced the RIAA's subpoena against an ISP without a pending lawsuit.[26] However, the Court of Appeals for the District of Columbia overturned the district court's decision and forced the copyright holders to first file a lawsuit.[27] As a result, filing lawsuits against individual file-sharers became incredibly expensive, labor-intensive,

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20. Dwight Silverman, *Senator's 'Extreme' Cure for Piracy is Unconstitutional*, HOUS. CHRON., June 21, 2003, at 1C.

21. Jeordan Legon, *261 Music File Swappers Sued: Amnesty Program Unveiled*, at <www.cnn.com/2003/TECH/internet/09/08/music.downloading> (visited March 1, 2006).

22. Yu, *supra* note 5, at 660.

23. Yu, *supra* note 11, at 379.

24. *Id.*

25. Yu, *supra* note 5, at 659.

26. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs. Inc.*, 240 F. Supp. 2d 24 (D.C. Cir 2003)

27. *Recording Indus. Ass'n of Am., Inc. v. Verizon Internet Servs. Inc.*, 351 F.3d 1229, 1239 (D.C. Cir. 2003).

and time-consuming.[28]

Further, innovative technology is constantly making the detection of file-sharers even more difficult.[29] FreeNet, for example, is a program intended to prevent governments and corporations from restricting the flow of any kind of digital information. FreeNet uses a secure approach of routing between users by employing encryption to protect the information from eavesdroppers who were not directly invited to be part of the network.[30]

The practical difficulties of suing every file-sharer have made most of the 150 million P2P users rightfully believe they will never be hauled into court, meaning the RIAA's threat of litigation is not a deterrent.[31]

Even if the RIAA could somehow sue each infringer, doing so would be imprudent.[32] Since many users of P2P networks also purchase the tangible forms of the music they download, the RIAA would be suing its own consumers – a terrible business decision.[33] Copyright owners would be suing the very consumers who provide a very large share of their profits. The RIAA's decision to sue its own customers is already being considered one of the largest public relations disasters of recent history. Jesse Jordan, the father of a file sharing defendant and owner of thousands of records and CDs, declared:

> [The RIAA] has sued one of their most avid customers. The RIAA says that they wanted to teach these kids and their families a lesson. The lesson we learned is that we will never ever buy another product from any of those companies again. That's the lesson we're going to tell everyone.[34]

The RIAA has also instituted coercive measures that target suppliers, such as the software developers who provide platforms for

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28. Yu, *supra* note 5, at 675.

29. John Markoff, *New File sharing Techniques Are Likely to Test Court Decision*, THE NEW YORK TIMES, August 1, 2005, at C1.

30. *Id.*

31. U.S. Representative Howard L. Berman, *The Truth About the Peer to Peer Privacy Prevention Act: Why Copyright Owner Self-help Must be Part of the P2P Piracy Solution*, at <writ.corporate.findlaw.com/commentary/20021001_berman.html> (visited February 20, 2006).

32. Suppappola, *supra* note 3, at 165.

33. *Id.*

34. Jon Healey & P.J. Huffstutter, *4 Pay Steep Price for Free Music*, L.A. TIMES, May 2, 2003, at A1.

P2P file sharing.[35] In the most publicized file sharing case, the record industry sued Napster for vicarious and contributory copyright infringement for facilitating unauthorized copying, downloading, transmission, and distribution of copyrighted works by others.[36] The Ninth Circuit Court of Appeals rejected Napster's "fair use" argument, holding that a showing of significant noncommercial use would not be sufficient to overcome liability for contributory infringement. The court stated, "[I]f a defendant could show that its product was capable of substantial and significant noncommercial uses, the copyright owner [then] would be required to show that the defendant had reasonable knowledge of specific infringing files."[37] Although the court found that Napster was capable of commercially significant non-infringing uses,[38] it concluded that "sufficient knowledge existed to impose contributory liability when linked to demonstrated infringing use of the Napster system."[39] Specifically, the record supported the court's finding that "Napster has actual knowledge that specific infringing material is available using its system, that it could block access to the system by suppliers of the infringing material, and that it failed to remove the material."[40] Despite the ruling against Napster – which lead the company to file for bankruptcy protection – a myriad of similar services, such as Gnutella, Bearshare, and Limewire, immediately sprang up and took Napster's place.[41]

The RIAA continued its aggressive litigation tactics against P2P software providers, apparently unfazed by the rapid appearance of Napster's successors and the failure of the Napster decision to deter further P2P software developers.[42] The RIAA faced an even more problematic issue with the onslaught of new P2P software engines.[43] Napster was held liable because its service ran on a centralized server, meaning the company could control the content being transferred.[44] However, many of the new engines, such as Grokster and Morpheus,

35. Yu, *supra* note 11, at 388.
36. A&M Records, Inc. v. Napster, Inc., 114 F. Supp. 2d 896 (N.D. Cal. 2000).
37. A&M Records, Inc. v. Napster, Inc., 239 F.3d 1004, 1021 (9th Cir. 2001).
38. *Id.* at 1021.
39. *Id.*
40. *Id.* at 1022.
41. Yu, *supra* note 11, at 391.
42. Yu, *supra* note 5, at 681.
43. Yu, *supra* note 11, at 391.
44. Napster, *supra* note 37.

developed by Streamcast Networks,[45] did not have a centralized server.[46] In the *Grokster* case, Justice Souter wrote for a surprising unanimous Court that "one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties."[47] In other words, the Court essentially created a new indirect copyright infringement cause of action derived from patent law – a theory of inducement – in which one could be held liable based on the existence of improper intent.[48]

The entertainment industry celebrated the *Grokster* ruling.[49] Peter Felcher, one of the lawyers acting for rightsholders in the *Grokster* case, proclaimed the decision as "a victory for copyright owners, and the fact that it was nine to nothing spoke in a good way for copyright holders."[50] While *Grokster* was arguably a victory for copyright owners, the decision has not helped solve the online infringement problem for the RIAA.[51] In the wake of the *Grokster* decision, the RIAA has sent cease-and-desist letters to several P2P operators, which as a result, has lead them to either shut down (which former P2P platforms such as eDonkey, Bearshare, Kazaa, and WinMX have done) or transform themselves into legal music services.[52] Some of the P2P operators, like Kazaa who decision to transform itself into a legal music service will pay more than $100 million in a settlement to various record labels.[53]

Despite the success of RIAA's recent litigation, the number of

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45. *Q&A: File sharing Ruling*, BBC NEWS (June 6, 2005), at <newsvote.bbc.co.uk/go/pr/fr/-/1/hi/technology/4628291.stm> (visited March 3, 2006).

46. Yu, *supra* note 11, at 391.

47. Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 125 S.Ct. 2764, 2780 (2005).

48. Id.

49. Monika Ermert, *After Grokster, Industry Seeks Legal P2P as Mobile Music Takes Over*, INTELLECTUAL PROPERTY WATCH (Jan. 29, 2006), at <www.ip-watch.org/weblog/index.php?p=209&res=1024_ff&pr> (visited Sept. 30, 2006).

50. *Id.*

51. David Murphy, *What Happened to Grokster?*, MEDILL NEWS SERVICE (December 2005), at <docket.medill.northwestern.edu/archives/003274.php> (visited February 13, 2006).

52. *P2P Companies to Exit Business*, DRM WATCH STAFF (September 22, 2005), at <www.drmwatch.com/ocr/article.php/3550721> (visited September 14, 2006).

53. Caroline McCarthy, *With Settlement, Kazaa Casts Off Its Pirate Garb*, CNET NEWS.COM (July 27, 2006), at <news.com.com/Kazaa+settles+suits+with+more+than+100+million/2100-1027_3-6099064.html> (visited September 5, 2006).

P2P file-sharers has not dropped. Technology research firm BigChampagne reported that approximately 6.5 million users shared files on P2P systems as of October 2005.[54] In fact, BigChampagne reports that the most recent peak in sharing directly followed the *Grokster* decision in July.[55] One possible explanation for this is that court rulings do not deter users from file sharing, but instead merely force them to migrate from one program to another.[56] Moreover, Fred von Lohmann, a senior staff attorney for the Electronic Frontier Foundation, suggests that the *Grokster* decision will have a limited impact because a company could escape liability by simply not promoting its service as an infringement tool or as a method for obtaining illegal gains.[57]

Despite the fact that its legal victories against P2P software providers have not deterred file sharing, the RIAA continues to launch misguided attacks on the supply side of the P2P problem. For example, the RIAA has begun using copyright protection technologies, known as Digital Rights Management ("DRM").[58] These technologies, which include encryption, digital watermarking, and the use of trusted systems, are meant to allow copyright holders to lock up their creative works.[59] However, such measures entice hackers eager to crack the latest encryption technology available.[60] This could cause a copy-protection arms race between the entertainment industry and hacker community.[61] If this happened, the industry would essentially be spending money on copy-protection technology that yielded a proportionately small return, if any at all.[62]

Further, using DRM to combat piracy could cause a backlash.[63] There is a very fine line between protecting digital technology and creating an unattractive product for consumers.[64] Sony, for example, suffered negative criticism after announcing its plans to release copy-protected CDs that can only be copied from a computer to a Sony

54. Murphy, *supra* note 51.
55. *Id.*
56. *Id.*
57. *Id.*
58. Yu, *supra* note 11, at 392.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.* at 393
63. Suppappola, *supra* note 3, at 171.
64. *Id.*

portable player.[65]

Ultimately, the RIAA's greatest mistake has been relying on laws that 1) create confusion about what the law is, and 2) utterly ignore social and culture norms. Copyright laws are so complicated and dense that even copyright scholars and lawyers have difficulty discerning the true meaning and extent of the law.[66]

Past laws have created a culture in which many believe downloading music files for personal consumption is not or should not be a crime.[67] This logic has stemmed from a variety of sources, starting with the *Sony Corporation of America v. Universal City Studios, Inc.* decision.[68] The Court held that an individual could legally copy television shows (copyrighted works) when done for the purpose of "time-shifting," (i.e., recording a program that was broadcast on television, watching it once at a later time, and then erasing the recording) which is considered "non-commercial fair use."[69] The Audio Home Recording Act of 1992 ("AHRA") codified and enforced the "fair use" doctrine.[70] The AHRA prohibits bringing a lawsuit alleging copyright infringement based on the noncommercial copying of music by a consumer."[71] *Sony* and the AHRA have led consumers to believe that occasionally downloading a few songs is not a serious crime unless it is for profit.[72] This belief helps explain why many P2P file sharers have a difficult time believing that downloading music online does not fall within the "fair use" exception because it is "economic in nature."[73]

Opponents of P2P file sharing might contend that consumers' prior understanding of the law is irrelevant because all that matters is what is illegal now. Much like the record industry's deficient attempts

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65. *Id.*

66. Peter K. Yu, *Still Dissatisfied After All These Years: Intellectual Property, Post-WTO China, and the Avoidable Cycle of Futility*, Legal Studies Research Paper Series Research Paper No. 03-11, GEOR. J. OF INT'L & COMP. L., Vol. 34, 2005, available at <ssrn.com/abstract=578584> (visited March 9, 2006).

67. *Id.* at 11.

68. Sony Corporation of America v. Universal City Studios, Inc., 464 U.S. 417 (1984).

69. *Id.* at 456.

70. David J. Colletti, Jr., *Technology Under Siege: Peer-to-Peer Technology is the Victim of the Entertainment Industry's Misguided Attack*, 71 GEO. WASH. L. REV. 255, 260 (2003).

71. *Id.* (citing 17 U.S.C. 17 § 1008 (2000)).

72. Yu, *supra* note 11, at 378

73. Napster, *supra* note 37.

to eradicate file sharing, this position ignores the social and cultural realities of today's world.[74] Consumers may have been more willing to accept that downloading music was a serious crime had it not been for the building enmity music fans felt towards the record labels.[75] Many consumers feel CDs are entirely overpriced (especially with only one or two good songs on the album) and that record companies have engaged in collusive pricing to maintain such high prices.[76] Charging roughly $16 per CD is a bit excessive considering that a CD costs less than a dollar to manufacture.[77] Many people who have never used P2P software to download music share this sentiment, believing a more appropriate price would be 50 cents per song or $3 for an album.[78] In light of the music industry's price gouging, many P2P file-sharers see music piracy as a form of protest against record companies.[79] When one student was asked why she downloads free music without feeling bad about it, the student described record companies as "evil conglomerates who shove mediocre music down [consumers'] throats at inflated prices and then gouge the artist's profits."[80]

Illegal file sharing will continue at alarming rates as long as consumers continue to see the record industry as the greedy middleman, and the record industry continues viewing file sharing as an epidemic that needs to be squashed by stricter rules and penalties. As Fred von Lohmann candidly surmises, "[M]ost file-sharers, most music fans frankly know that it's against the law, and they don't care. I don't think that legal decisions are going to make any difference at this stage."[81]

74. Condry, *supra* note 18 (manuscript at 2, on file with author).
75. *Id.* at 20
76. *Id.*
77. *Id.*
78. *Id.*
79. Yu, *supra* note 11, at 383.
80. Angelique Little, *Record Industry Should Embrace Online Services*, L. A. TIMES, May 25, 2003, at Business 13.
81. Murphy, *supra* note 51, at 2.

II. Same Song, Different Singers: The U.S. Battle to Achieve Greater Intellectual Property Protection in China

A. Another Misguided Approach

The recent accession of China into the World Trade Organization ("WTO") has only further cemented a long-standing truth: China's importance in the global economic community.[82] Despite its accession into the WTO, China's lack of intellectual property protection poses a great concern. China has always been considered a country with one of the highest piracy rates.[83] With the emergence of technology that can produce unlimited perfect copies of copyrighted material in digital format, the ability of piracy hotbeds such as China to illegally make and sell copies of popular CDs, DVDs, and software applications has become an even greater concern.[84]

However, like the music industry, the United States has adopted a narrow, self-interested approach in dealing with the Chinese intellectual property problem. This approach is based on the United States' 1) concern only for the ultimate impact Chinese IP laws will have on U.S. business opportunities and 2) ethnocentric view of what constitutes sufficient intellectual property protections.[85]

The United States' concern for the direct fiscal impact Chinese infringement has on the U.S is understandable considering the statistics: in 2004, infringement levels remained at 90 percent or above for virtually every form of intellectual property, and estimated U.S. losses alone ranged between $2.5 billion and $3.8 billion.[86] However, in multiple instances the United States was concerned more with the

82. Min S,.Xu & Jon F. Tuttle, *China Has Joined the WTO. Are You Prepared?* (2003), available at <library.findlaw.com/2003/Aug/14/132989.html> (visited March 3, 2006).

83. Eric J. Sinrod, *Reducing Software Piracy Will Produce More Jobs and a Stronger Economy* (January 5, 2006), available at <writ.corporate.findlaw.com/commentary/20060105_sinrod.html> (visited October 12, 2006).

84. Ku, *supra* note 2, at 264.

85. Peter K. Yu, *How the International Intellectual Property System, Meant to Create Global Harmony, Has Created Conflict Instead*, FINDLAW'S WRIT (Nov. 14, 2002), at <writ.corporate.findlaw.com/commentary/20021114_yu.html> (visited Feb. 9, 2006).

86. Yu, *supra* note 66, at 1.

bottom line than much larger issues.[87] The United States turns a blind eye towards egregious human rights and civil liberties violations so long as it can secure stronger intellectual property rights.[88] For example, Chinese authorities enlisted the help of law enforcers who were notorious for human rights violations in order to comply with Western demands for stricter piracy enforcement.[89] In addition, Chinese authorities have enforced the death penalty on infringers in severe cases as a way to demonstrate China's seriousness about eradicating piracy.[90] The United States' complicity in this process reinforces the common perception that Western governments are more concerned with intellectual property rights than civil rights in China.[91]

Moreover, the United States has been stubbornly ethnocentric by insisting on an intellectual property regime largely modeled after those of the West.[92] The United States has essentially demanded that China institute the U.S. copyright system, which the United States believes is superior.[93] However, this will inevitably lead to an inefficient and potentially harmful system.[94] For example, the United States' 1976 Copyright Act was the product of compromises among American interest groups that participated in the drafting process.[95] Presumably, China does not face similar interest group pressure, nor does China have the same needs and concerns that the United States had. A verbatim transplant of the Copyright Act would therefore likely harm China's interests and hamper IP law reform.[96]

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87. Peter K. Yu, *From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century*, 50 AM. U.L. REV. 131, 133 (2000).

88. *Id.* at 174.

89. William P. Alford, *Making the World Safe for What? Intellectual Property Rights, Human Rights and Foreign Economic Policy in the Post-European Cold War World*, 29 N.Y.U. J. INT'L L. & POL. 135, 143 (1997).

90. *Id.*

91. Robert Burrell, *A Case Study in Cultural Imperialism: The Imposition of Copyright on China by the West*, INTELLECTUAL PROPERTY AND ETHICS 195 (Lionel Bently & Spyros M. Maniatis eds., 1998).

92. Yu, *supra* note 85.

93. Yu, *supra* note 66, at 5.

94. Peter K. Yu, *Piracy, Prejudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate* (2001), available at <papers.ssrn.com/paper.taf?abstract_id=262530> (visited March 1, 2006).

95. *Id.*

96. *Id.*

B. What Else Could Result From a Misguided Approach? More Misguided Solutions

In an attempt to bring intellectual property reforms to China, the United States has instituted coercive measures that include threats of trade sanctions, trade wars, non-renewal of most-favored-nation status, and opposition to China's entry into the WTO.[97] These laws have ushered in a new, yet inadequate intellectual property system.[98] The United States' coercive tactics have created a cycle of futility: the United States threatens China with sanctions; China responds with retaliatory threats; after months of negotiation, the two finally hammer out an agreement whereby China makes short-term concessions; but because the improvements are short lived, the entire process begins again.[99]

Much like in the music industry, the United States' tactics in China may backfire, leading to China's retaliation, hostility, and reluctance to adopt any further Western intellectual property reforms.[100] For example, when the United States threatened to sanction China for its lack of intellectual property protection, Chinese Premier Li Peng responded by making a $1.5 billion order for French Airbus planes over of American Boeing planes.[101] The United States' threats undermined, rather than accomplished, its economic goal in this instance.[102] Such a confrontational policy could also lead risk-aversive companies to limit their business in China.[103] If these coercive threats continue to escalate, the United States might find itself faced with complete boycotts of American products,[104] a destabilized international trading system,[105] a global trade war in which resources are allocated inefficiently, and criticism from other countries.[106] Such consequences would severely and negatively impact the United States and international trade in general.[107]

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97. Yu, *supra* note 66, at 5.
98. *Id.*
99. *Id.*
100. Yu, *supra* note 87, at 134.
101. Craig R. Whitney, *China Awards Huge Jet Order to Europeans*, N.Y. TIMES, Apr. 11, 1996, at A1.
102. Yu, *supra* note 87, at 169.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 171.
107. *Id.*

The United States has also targeted the supply channels of piracy in China without addressing why demand for piracy exists.[108] But the United States has not limited its focus to the cartels responsible for producing mass quantities of pirated goods; it has also targeted the Chinese authorities for their inability to crack down on piracy.[109] One analyst opined:

> It is laughable to hear excuses from Beijing that they can't control the 50 pirate CD factories. If they were turning out thousands of copies of the BBC documentary on the Tianemen Square protest – rather than bootleg copies of "The Lion King" – the factory managers would be sharing a cell with other dissidents in a heartbeat.[110]

The above statement speaks volumes about the United States' generally misguided approach to Chinese piracy. The United States should consider that the high demand for pirated goods in China derives from China's strict control over the dissemination of information and media products.[111] China's heavy regulation of the media business and publishing industry makes many high-demand products unavailable to consumers, who must look to the black market and pirated goods.[112] Rather than focusing on piracy cartels and the ineffectiveness of Chinese authorities, the United States should pressure the Chinese government to lessen its restriction on the type of goods allowed in the country. This would decrease piracy more effectively than shutting down a piracy factory that will be replaced by ten more factories upon its closure.[113]

China's failure to protect intellectual property is not a consequence of its lack of laws. Thanks to the United States' coercion, China has very comprehensive IP laws in place that even recognize some rights that the U.S. laws do not.[114] But these laws merely exist in the books because the United States imposed them without regard to the cultural, social, political, and economic realities of China.[115] To be effective, laws must be accompanied by a legal

108. Yu, *supra* note 66, at 9.
109. *Id.*
110. *Id.*
111. Yu, *supra* note 11, at 417.
112. *Id.*
113. *Id.* at 418.
114. Yu, *supra* note 94, at 42.
115. *Id.* at 43.

culture that fosters voluntary compliance.[116]

The Agreement on Trade Relations Between the United States and the PRC – one of the earliest treaties signed after China's reopening – illustrates the United States' disregard for local values.[117] By virtue of this agreement, China assumed an international legal obligation for intellectual property before it had even established a domestic intellectual property protection system.[118] The idea that a country could respect, let alone enforce, an international treaty for a type of law which the country itself had not yet adopted makes little sense.

The United States has also refused to take into account Chinese cultural and moral norms that shape Chinese attitudes toward intellectual property protection. Confucian principles have predominated in China for centuries.[119] Confucianism views creativity as a collective benefit to the community and despises commerce, especially those who created works for sheer profit.[120] The concept of a copyright, which allows a significant few to monopolize important materials, directly contradicts traditional Chinese moral standards.[121] The notion of "property" is a cultural norm, since there is nothing inherent in an object that connotes ownership; it would be naïve to believe that such a norm could change simply because a rule has been instituted.[122] Nonetheless, the United States' coercive measures attempt to do just that.

The United States has also repeatedly ignored political and legal realities, conveniently forgetting the lasting impact the Cultural Revolution had on the citizens of China.[123] The Cultural Revolution coordinated massive socialist campaigns that emphasized the welfare of the State and disapproved of concepts such as authorship and remuneration from creative efforts.[124] One steel worker during the Cultural Revolution asked,

> Is it necessary for a steel worker to put his name on a steel ingot

116. *Id.*
117. Yu, *supra* note 11, at 355.
118. *Id.* at 356.
119. *Id.* at 360.
120. *Id.* at 361.
121. *Id.* at 360.
122. John Carroll, *China and Intellectual Property* (June 30, 2005), at <blogs.zdnet.com/carroll/?p=1466> (visited March 6, 2006).
123. Yu, *supra* note 94, at 13.
124. *Id.*

> that he produces in the course of his duty? If not, why should a member of the intelligentsia enjoy the privilege of putting his name on what he produces?[125]

Despite reforms, cultivating respect for intellectual property rights has been a slow process, especially after socialist propaganda inundated Chinese people for so long.[126]

The United States has further disregarded China's current legal and political realities by assuming China has a legal system that can enforce the laws that the United States thrusts upon it.[127] Among the current problems facing China are the absence of the rule of law, lack of transparency within the court system, confusion caused by conflicting laws and regulations, confusion and rivalry within the enforcement apparatus, and corruption.[128] The possibility of effective enforcement at the grassroots level is unlikely until these issues can be resolved.[129]

III. Possible Solutions

The current solutions to P2P online infringement and piracy in China have clearly been ineffective. However, there are several possible solutions that could be effective when applied to both situations.

A. Educating Nonstakeholders about the Copyright System[130]

A clear divide exists between those who wish to achieve strong intellectual property protections and those who are either indifferent or would rather not see such strict standards enforced. Members of the former category are the "stakeholders" and include copyright holders and countries such as the United States Members of the latter category are the "nonstakeholders" and include P2P file-sharers, Chinese authorities, and Chinese citizens who purchase counterfeit goods. In order to bridge the divide between these groups, nonstakeholders must be educated about the benefits of

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125. William P. Alfred, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION, 13 (1995).

126. Yu, *supra* note 94, at 14.

127. *Id.* at 43.

128. *Id.* at 44.

129. Yu, *supra* note 11, at 368.

130. Peter K. Yu, *The Escalating Copyright Wars*, 32 HOFSTRA L. REV. 907, 908 (2004).

maintaining a copyright system. For P2P file-sharers, education should include clarifying the law in a language that makes sense. Although it may be difficult to convince the current generation that copyright infringement ultimately harms the millionaire artists they love, education might slightly decrease the number of file-swappers. Since a significant and immediate impact on file sharers is unlikely, the record industry should focus on future generations by gradually eradicating the acceptability of downloading music for free.[131]

Education would likely have a much greater impact in China. Educating China about the benefits of copyright protection has already proved successful.[132] For example, the Business Software Alliance and the Chinese Software Alliance successfully promoted the use of original software in China, causing many Chinese to stop seeing copyright protection as alien.[133]

Equally important as educating Chinese citizens about IP is educating Chinese authorities about how to prioritize a sound IP protection scheme. A recent study showed that a 10 percentage point decrease in China's piracy could generate 2.6 million IT jobs in China by 2009.[134] This figure should be very enticing to a country such as China, which is desperate to expand its economic power.[135]

B. Incentive to Adhere to Copyright Laws

The only way to reduce copyright infringement to acceptable levels is to provide an incentive for people to adhere to the laws rather than infringe on copyrights. Federal judges can rule that file trading infringes on copyrights and enjoin online services that allow file trading, but judges cannot make the 30 million people exchanging music files over the Internet obey the copyright laws.[136] This same logic applies to China as well: no matter how many laws are passed, there must be an incentive for Chinese citizens to avoid purchasing pirated goods.

But why would rational consumers pay a premium price for

131. Yu, *supra* note 5, at 759.

132. Yu, *supra* note 130, at 947.

133. *Id.*

134. Eric J. Sinrod, *Reducing Software Piracy Will Produce More Jobs and a Stronger Economy* (Jan 5, 2006), at <writ.corporate.findlaw.com/commentary/20060105_sinrod.html> (visited February 20, 2006).

135. Yu, *supra* note 94, at 15.

136. Yu, *supra* note 11, at 440.

legitimate goods when almost identical copies are available for free (via download) or at a lower cost (pirated copies)?[137] A rational consumer will usually not pay a premium for identical objects.[138] Most consumers try to obtain as many things they can as cheaply as possible.[139] However, just because something is "free," that does not mean people will not pay for the item.[140] Consumers have been willing to pay and use commercial means when there is some value in doing so (i.e., bottled water compared to tap water).[141] The solution to piracy in the United States and China must therefore turn on how consumers can be convinced to pay money for content that is obtainable for free or at a reduced cost.

One method is to avoid making the products identical by offering a premium that is unobtainable in the illegal goods. Premiums may be tangible or intangible. Tangible premiums are warranties, replacement part guarantees, free upgrades, giveaways, and bonus materials on CDs (much like the DVD movie model of special features).[142] Intangible benefits are ease of mind, taking comfort in supporting the artist, and obtaining legitimate products (the lack of accountability in the black market creates a risk that the consumer will not get the desired product).[143]

While premiums are attractive to consumers, premiums will have little impact if the industry continues to price things above market value. Industries like the RIAA must lower the prices of CDs, which are universally considered to be overpriced. One possible way to lower prices is to use Magnatune's example of "tipping."[144] Magnatune is a model in which consumers can listen to an entire album for free but are asked to pay the "suggested price" of $5 if they wish to download the album onto a CD.[145] Despite posting a suggested price of $5, Magnatune reported that is receives an average of $8.63 an album, which shows that not all consumers will pay the lowest price possible for an item.[146]

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137. Berman, *supra* note 30, at 2.
138. Condry, *supra* note 18 (manuscript, at 7, on file with author).
139. *Id.*
140. *Id.*
141. *Id.*
142. *See* Suppappola, *supra* note 3, at 177.
143. *Id.*
144. Yu, *supra* note 5, at 663.
145. *Id.*
146. *Id.*

Further, the RIAA must lower its prices for legal MP3 downloads as well. Although 99 cents per song may seem reasonably low, it is not. An iPod, for example, costs a consumer around $300, but will hold up to 15,000 songs.[147] At 99 cents a download, it would be unreasonable to expect a consumer to spend $15,000 (500 times the amount they spent on the hardware, or the equivalent of a brand new car) to fill it. Further market research must be done to find an optimum price that entices enough customers to download the songs legally while still allowing labels and artists to make a profit. If music were cheap enough, consumers might not think copying is worthwhile.[148]

While it is unlikely record industries would be willing to take this risk, an alternative might be to price products at or below cost. One way to drive away pirates is to make it unprofitable for them to continue. This would also allow most file-sharers to become accustomed to purchasing music legally online and change the current culture of free downloading. Microsoft garnered and maintained its large market share through similar tactics. The RIAA might be desperate enough to engage in such dubious actions.

Alternative pricing can also be applied to the piracy problem in China, and in a few limited instances, it already has already been applied.[149] For instance, the movie industry has begun releasing low priced dubbed films in China.[150] This provides a more reliable product to film purchasers without the threat of entering the United States as parallel imports, since the films are dubbed in the local language.[151] Further, as Chinese citizens increase their disposable income, they may become increasingly unsatisfied with the low quality entertainment found in the black market and begin to demand authentic goods.[152] These expectations and how they will correspondingly affect potential prices must still be tempered.[153] Even though disposable income in China is expected to grow 20 percent annually, a Chinese citizen cannot be expected to pay $20 (Western

147. *See* <www.apple.com/itunes> (Follow "iPod" hyperlink) (visited March 7, 2006).
148. Yu, *supra* note 130, at 948.
149. *Id.*
150. *Id.*
151. Yu, *supra* note 66, at 8.
152. *See id.*
153. *Id.*

prices) for a textbook when her household income is $40 a month.[154]

Conclusion

There is no doubt that copyright infringement is a serious problem. The number of infringers, specifically consumers of pirated goods and P2P file-sharers, has burgeoned to staggering numbers. Both the United States and the RIAA have reacted to the problem in a terribly shortsighted and narrow-minded manner. The United States and the RIAA then compounded the problem by instituting solutions that caused more harm than good. Even worse, each party refused to compromise its position in spite of the recurring failures. The dangers of refusing to find a compromise in an area as complicated as copyright and intellectual property law is best illustrated by an imaginary conversation between two people using maritime radios:

> FIRST SPEAKER: Please divert your course 15 degrees to the north to avoid a collision, over.
>
> SECOND SPEAKER: Recommend you divert YOUR course 15 degrees, over.
>
> FIRST SPEAKER: This is the captain of a US Navy ship. I say again, divert your course, over.
>
> SECOND SPEAKER: No, I say again, divert YOUR course, over.
>
> FIRST SPEAKER: This is an aircraft carrier of the US Navy. We are a large warship. Divert your course now! Over.
>
> SECOND SPEAKER: This is a lighthouse, your call.[155]

Regardless of the situation, it is always more prudent to understand the totality of the circumstances before deciding on a course to follow. By more fully comprehending the complexities of copyright and intellectual property law, the United States can chart a better course in its approach to piracy.

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154. *Id.*

155. Jerry Everard, VIRTUAL STATES: THE INTERNET AND THE BOUNDARIES OF THE NATION-STATE 82 (2000).

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